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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 629.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,
VS.
WILLIAM H. WEMYSS, RESPONDENT.

BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

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I.

There is no conflict between the decision of the Sixth Circuit in the instant case and the decisions of other circuit courts of appeals in the cases of Fahs v. Merrill, 142 F. 2d 651; Commissioner v. Bristol, 121 F. 2d 129; and Commissioner v. Greene, 119 F. 2d 383.

This cause involved the surrender of an existing vested property right, to-wit, a life income from certain stocks, in consideration of the transfer which was sought to be taxed as a gift. As stated in the opinion of Martin, C. J.:

"This case differentiates from those cases in which prospective husbands and wives have entered into prenuptial agreements as to the interest to be acquired by the lady in the property and estate of the gentleman. In these cases the prospective wife was agreeing to surrender only herself to the bonds of matrimony without an accompanying surrender of any property owned by her. She was providing against the exigencies of matrimony by fixing a definite basis for her participation in the property or estate of the man she was about to marry. For example, see *Commissioner of Internal Revenue* v. *Bristol*, 121 F. 2d 129 (C. C. A. 1).

"Here the prospective wife was not contracting concerning the subject matter of her interest in the estate of the prospective husband. She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

"Furthermore, the Wemyss transfer is completely disassociated from any indicia of an intent to avoid or reduce death taxes. The minds of the contracting parties at the time of the transfer were obviously upon their future life together and not upon the effect of the transfer in the event of the death of either. In no aspect was the transfer made in contemplation of death."

Record, pp. 75-76.

In *Fahs* v. *Merrill*, 142 F. 2d, at page 654, this fundamental distinction appears from the following language of the court:

"It will be noted that the agreement of March 7, 1939, which is the recited and actual consideration for the transfer, and which alone purports to relinquish anything on the part of Miss Desmare, was made before she was married, when she had no dower or other right whatever in Merrill's property. It is not a case in which one already a wife sells or relinquishes for a consideration the rights which the law

has given her, whether she relinquishes them to her husband or to another. We may well concede that in such a case she gives a money value for what she gets. Such is *Lasker* v. *Commissioner,* 7 Cir., 138 F. 2d 989."

In the present case the property which Mrs. More surrendered was acquired from a *previous husband,* as distinguished from property which might vest under a future marriage with a *prospective* husband.

Commissioner v. *Bristol,* 121 F. 2d 129, likewise involved only the release of a *prospective* and *contingent* interest in the husband's estate, as distinguished from the surrender of a vested property right given to a widow by a previous husband and presumably taxed at the time of its previous creation.

Commissioner v. *Greene,* 119 F. 2d 383, involved only the question of whether a California statute legally obligated an incompetent mother to support two adult daughters because of their inability to earn a living.

II.

There is no error in the decision of the Sixth Circuit in this cause.

(a) Section 503 of the Revenue Act of 1932 by express language requires only the presence of a consideration capable of being valued in money or money's worth—it does not require the consideration to move to the transferor. It is conceded that the property right surrendered by Mrs. More was (1) a consideration for the transfer, and (2) was capable of valuation in money or money's worth.

(b) Treasury Regulations 79, Articles 1 and 8, by express terms are applicable only where the transfer in-

volves either a sale or exchange of property and the seller receives less than adequate and full consideration in money or money's worth. They are intended to prevent evasion arising from a purported sale or exchange where the real intent was donative in character.

(c) The contract between respondent and Ellen Stokes More was an arm's length transaction. Respondent was sixty-three years old (R. 28). He married first in 1919 and his wife died in 1934, leaving two children. Mrs. More was forty-four years of age (R. 13). She first married in 1925 and her husband died in 1934, leaving a son surviving. The contract resulted from mature consideration of these two mature persons, due to a prospective financial loss legally resulting from a second marriage under the provisions of the trust indentures executed by Mrs. More's first husband in 1927 and 1929. It was the result of calm deliberation intended to repair a financial loss. It was executed prior to the marriage and Mrs. More was represented by her father, an attorney, who prepared the contract. After being executed by the contracting parties, it was acknowledged before a notary public and was then registered in the register's office of Davidson County, Tennessee (R. 36-37).

Treasury Regulation 79, Article 8, interpreting Section 503 of the Revenue Act of 1932, contains the following language:

> "However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth."

The legal detriment being a consideration reducible to money value, and the tax court having clearly found

facts completely negativing donative intent, under the foregoing treasury regulations the court will not inquire into any possible differences in value but must consider the transfer as having been made for an adequate and full consideration in money or money's worth.

Lasker v. *Commissioner*, 138 F. 2d 989.
Jones v. *Commissioner*, 1 Tax Court 1207.

In *Jones* v. *Commissioner*, 1 Tax Court 1207, the tax court held specifically that any assessable tax was that imposed by authority of section 501. The concluding paragraph of the opinion by Leech, J., is as follows:

> "But aside from that frailty, we think the present transfer was not within the purview of section 503, *supra*. That section can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed by authority of section 501. It is expressly limited to transfers 'by gift.' 'Gift' is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evidenced here, in which there was no donative intent. Regulations 79, Articles 1, 2 and 8, approved October 30, 1933, and articles 1, 2, and 8 of the same regulations, approved February 26, 1936. See *L. W. Mesta*, 42 B. T. A. 933; reversed, 123 F. 2d 986; certiorari denied, 316 U. S. 695; *Walter S. Halliwell, supra*. We think that is correct."
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> 1 Tax Court, p. 1212.

It was further argued by the respondent (in the above case) that no value was established for the wife's right to maintenance and support in satisfaction of which the transfer in question was made. It was insisted that, in

the absence of specific proof as to the value of the wife's right, the entire transfer was taxable. This contention was rejected.

> "Again we do not agree. The very fact that the attorneys representing petitioner's wife in dealing at arm's length with his attorneys were able to exact a payment of $222,643 in settlement of his obligation is persuasive evidence to us of the value of her right. The amount which the court, in the absence of the agreement, would have been called upon to award to petitioner's wife from his estate would have been based upon his income and the station in life in which he would reasonably be required to maintain his wife. The net income of petitioner for the 10 consecutive years ending with that in which the settlement occurred, averaged $110,000 for each year. At the time the settlement was effected, his income was increasing and the amount paid was little more than his net income for the current year. Thus, not only was the contested payment made as a result of a settlement negotiated at arm's length in which an adequate consideration will be presumed (*Commissioner* v. *Mesta*, 123 F. 2d 936), but the record affirmatively indicates that the settlement was financially favorable to petitioner. See *Young* v. *Young*, 323 Ill. 608, 155 N. E. 405; *Rice* v. *Rice*, 256 Mich. 287, 239 N. W. 256; *Miller* v. *Miller*, 90 Ind. App. 359, 168 N. E. 881; *Owens* v. *Owens*, 20 Ohio App. 518, 152 N. E. 767; *Harden* v. *Harden*, 77 Pac. 2d 721 (Okla.)."
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> 1 Tax Court, pp. 1211-1212.

(d) It should be noted that *Commissioner* v. *Bristol*, 121 F. 2d 129, relied on by petitioner, has been expressly repudiated by the tax court, and that the principle contended for therein has been recently repudiated by the Circuit Court of Appeals for the Second Circuit, as appears from the following quotation from *Jones* v. *Commissioner*, 1 Tax Court 1207:

"On review, our decision there was reversed. *Commissioner* v. *Bristol, supra.* We have not, however, departed from the view expressed in our opinion in that case. Moreover, the comparatively recent decision by the Second Circuit in *Commissioner* v. *Beck's Estate*, 129 F. 2d 243 (42-2, U. S. T. C., Par. 10195), is especially significant. In that case it was urged that the estate and gift tax provisions of the statute, being complementary, should be integrated for purposes of construction. Similarly rejecting this theory the court held that these provisions, though complementary, were separate and distinct in themselves and that the silence of Congress in its failure to require the integration of their provisions was 'strident.' "

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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